MASSACHUSETTS PUBLIC OPINION BILLS

PROF. GEORGE H. HAYNES
Worcester Polytechnic Institute

Direct legislation has found in Massachusetts a soil less congenial for speedy growth than in most of the other States. This has been due in part to the commonwealth's deep-rooted conservatism. To be sure her population has undergone most radical changes. Massachusetts has become the city State. More than two-thirds of her people—a proportion higher than in any other State—are living under municipal government, in cities of 12,000 and over. Thirty per cent of the inhabitants of the State are of foreign birth, while at least 25 per cent more are of foreign parentage. Yet, in spite of the fact that in hardly any other American State have the transforming influences of city life and immigration become so powerful, they have not succeeded in sweeping the commonwealth far from its ancient moorings: the Constitution of 1780 remains its fundamental law, and the traditions of a century and more ago control the voter of today.

The slowness of the growth of the direct legislation movement in Massachusetts has been due also, in part, to the relative excellence of her system of representation, from which it results that defects and abuses which have proved a serious menace in connection with legislation elsewhere have not caused equal alarm in the Bay State. In the first place, both houses of her legislature have a membership large enough to make possible pretty thorough-going representation.[1] Moreover, to a greater extent than any other New England State, Massachusetts approaches genuine equality of representation. Her legislators are elected by districts. Charges of gerrymandering are not very common, and there is here no representation of rotten boroughs which is for a moment to be compared with what is to be found in Rhode Island and Connecticut, and to a less flagrant extent in several other States.

[1] Her senate of 40 members is exceeded by but three other senates in New England, and three more in the rest of the country; her house, of 240 members, is exceeded by but three, all of which are in New England.

And, lastly, her elections are annual. Each year, thus, every one of her 280 legislators, who wishes to return to the State House, must come before the people for their verdict. By this means there is secured a degree of responsibility to the people, a swiftness of possible censure, greater than in almost any other American State.

Nevertheless, the past fifteen years, so fruitful in direct legislation measures elsewhere, have not been lacking in a vigorous propaganda in Massachusetts. In 1894 Governor Greenhalge endorsed the principle of the referendum, and earnestly recommended the enactment of a law for the submission of all acts of a local character to the municipalities affected by them. For a time, it looked as if the Bay State were to be stampeded into the adoption of the referendum; for the committee, to which had been referred the petition (headed by a trade-union journalist), in favor of a general referendum, reported a resolve providing for both a general and a local referendum, and this was adopted in the house by the astonishing vote of 156 to 2. The senate, however, amended the measure in such a way as to rob it of all force, and the house refused to concur. So the measure was lost.

It was half a dozen years before direct legislation propositions again secured the serious attention of the legislature. In 1900 there was presented a petition headed by a representative of the State branch of the American Federation of Labor, for a constitutional amendment providing for a popular initiative of amendments to the constitution. At that session, and also in the one following, this measure was ardently advocated by two or three members of the house, but reference to the next general court was its fate. In the third year, it was favorably reported from the committee, only to be voted down, practically two to one, in the house. Meantime, a general referendum measure was zealously championed by the same group in the house, and in the senate a resolve in favor of a referendum upon legislative measures was approved in 1902 after it had been so amended as to require that the demand for a referendum upon any measure be signed not by a mere 10 per cent of the voters in the commonwealth, but by 10 per cent of the registered voters in its every city and town. The motive of this amendment is obvious, for, in a State containing 354 individual municipalities, varying from 150 to 600,000, the task of securing the requisite signatures would prove a sheer impossibility.

But the Massachusetts legislature of 1903 showed unwonted eagerness for novelty in many directions. Quite a variety of direct legisla-

tion propositions were submitted, and house and senate finally concurred in proposing an amendment to the constitution providing for a popular initiative of specific amendments to the constitution on petition of 50,000 qualified voters.[2] But a proposed amendment in Massachusetts must first be passed by special majorities in the legislatures of two successive years and then submitted to the people; and when this amendment came before the legislature of 1904, it was given short shrift: the committee's report was adverse, and neither branch of the legislature gave it approval. And since that set-back to the present day, though many petitions for referendum or initiative measures have come before the legislature, not one of them has secured a favorable report.

It was after this baffling experience of 1904 that the advocates of direct legislation approached the general court of 1905 along a new line of attack. A representative of the American Federation of Labor (who two years before had been a petitioner for "an advisory referendum on certain matters pending before the general court"), now joined with several others in a plea for "legislation providing for the submission to the voters at the polls of questions of public policy in order to secure expressions of public opinion."

The house passed a bill based upon this petition by a close vote (89 to 78). In the senate, though ordered to a third reading, it was finally rejected by a vote of nearly two to one (10 to 19). The following year, upon a petition for legislation to "allow the voters to indicate their opinion upon important matters of public interest," the house passed the proposed bill, but in the senate it was rejected (12 to 17). At the next session, that of 1907, a similar proposition came before the legislature, backed by the Massachusetts Public Opinion League, which had been organized for the express purpose of urging this measure, and which claimed to have secured from a majority of the senators-elect pledges that they would vote in its favor. In the house of 1907 a bill was reported, petitions were received in its favor, and public hearings given; but the bill was, nevertheless, rejected by a vote of nearly two to one (135 to 80). In the senate the matter was not even brought to a vote.

The essential features of this last public opinion bill, as it emerged from committee and received the sanction of the Public Opinion

[2] Petitions for legislation of this nature have been presented at practically every session since 1893, but "leave to withdraw," or "reference to the next general court" has been their inevitable fate.

League, are as follows: Upon request from 1000 registered voters, asking for the submission of a question for an expression of public opinion, the request shall be referred to the State ballot law commission, a bi-partisan board of three members. If they determine that such question *is* one of public policy, they shall draft it in such simple, unequivocal, and adequate form as they shall deem best to secure a fair expression of opinion. Suitable forms of petition shall then be prepared and furnished, each form containing spaces for not more than 100 signatures. If, 60 days before the State election in question, these petitions shall have been filed, signed by 5000 voters, this question shall be placed upon the official ballot to be used at the next State election. No application is to be received which had been issued more than twelve months before the election concerned. Provisions were added for assuring the genuineness of the signatures both to the requests for the issuance of forms, and to the petitions. It was also provided that not more than four such questions should be placed upon the ballot at any one election; and that, after being negatived, substantially the same question should not be again submitted within less than three years.

This bill differs in several respects from its predecessors. It reduces from ten to less than one the percentage of the total number of registered voters whose applications are necessary in order to secure the placing of a question upon the ballot. On the other hand, it doubles the number of questions which may be voted upon at one election. These changes called from one of its opponents the comment that it was "twenty times more radical than the bill of the previous session."

The bill is notably reticent as to its real object. It was entitled "An act to authorize the submission to voters on official ballots at State elections of questions of public policy." But for whose benefit is this expression of public opinion to be secured? Oregon legislation has been more frank. In the law framed to secure a virtually popular election of United States senators, elaborate provision is made for the transmission of the results of the people's vote to the presiding officers of both branches of the legislature, who are required to lay them before the chambers, when assembled to elect a senator; the votes must then and there be canvassed and the name of the candidate having the highest number announced, "and *thereupon* the houses shall proceed to the election of a senator." In this Massachusetts measure, no provision is made for thus obtruding the people's

"opinion" upon the minds of the members of the legislature. It is assumed that the news of the popular vote will percolate the walls of the State House.

This proposal, novel in Massachusetts, has its clearest precedent in the Illinois law of 1901. This provided a form of what is loosely called an "advisory initiative" both for the State and also for cities. Upon the petition of 10 per cent of the registered voters, not more than three "questions of public policy" may be submitted to the voters at a State election. In the year following the passage of this act, three such questions were submitted, and all passed in the affirmative by majorities of five or six to one. In accordance with one of these votes, two acts have since been passed by the legislature. In 1904, again, three "public policy questions" were voted upon, the answer in all cases being favorable by majorities varying from between three and eight to one. Two acts, passed upon the basis of one of these votes, have since been declared invalid by the supreme court. A primary bill, based upon such a popular vote, is now monopolizing the attention of the Illinois legislature in its present strange state of suspended animation. For city votes of this nature, the law provided that the petition of 25 per cent of the registered voters should be necessary in order to secure the placing of questions before the people.[3] It was under this law that in the fall of 1906 for the third time the people of Chicago put the city on record in favor of the municipal ownership and management of street railways. To thorough-going advocates of direct legislation this Illinois law has given only moderate satisfaction. Since it provides merely for a vote expressive of an opinion, and not for an "instruction" to the representatives, and since the members of the legislature usually have not been pledged in advance to support these measures, some which met with popular favor have been ignored or suppressed by the legislature.

During the past year there has been something of a campaign in favor of an advisory initiative in Iowa, and for both an advisory initiative and an advisory referendum in Delaware, New Jersey and Minnesota. In Delaware the popular vote was favorable, in 1906, to this proposal by a majority of more than eight to one, yet the total vote was little more than one-half the vote for congressional candidates. It is claimed that under instructions from politicians, the election officers handed out the referendum ballots only when they

[3] Similar advisory powers in municipal affairs have been secured for the voters in Iowa and South Dakota.

were asked for. When the project came before the legislature, much stress was laid upon the smallness of the popular vote. It was passed by the house, only to be pocketed in senate committee.

One of the most interesting features of the campaign of the present year in Massachusetts was the controversy over the nature of representative government intended by the framers of the Constitution of 1780, and the effects upon it to be anticipated from the proposed legislation. To the conservative's charge that it was radical, even revolutionary, its advocates retorted that it would merely restore in part a right freely and frequently exercised in colonial days, a right explicitly asserted in the Constitution of the Commonwealth, and by the Fathers considered a normal feature of representative government in Massachusetts. Indeed, the Public Opinion League seemed to devote its main energies to an attempt rather to establish the historic precedent upon which they claim the public opinion bill stands than to proving the expediency of the proposed measure.

To the Bay State men of the last quarter of the eighteenth century, the prime essential in a constitution was a formulation of the rights, privileges and immunities of the citizen as against the government, in other words, a bill of rights. The lack of this was what placed the ratification of the Federal Constitution in peril. In the convention which framed her own constitution, almost the first step taken was to assign the drafting of the bill of rights to a strong committee (upon which were placed John Adams, Sam Adams and James Bowdoin), who showed their intelligence by virtually turning over the whole task to John Adams. With the exception of one or two sections, it stands today as it left his hand. The particular provision which has figured in this present-day controversy reads as follows:

ARTICLE XIX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

Giving instructions to representatives, here asserted as a right, was no innovation. The practice had been much in vogue, particularly in Boston. At least twelve times during the seventeenth century the men of Boston, in town-meeting assembled, gave instructions to their deputies in the general court. In the eighteenth century such instructions had been given at least thirty-six times before this article was embodied in the State Constitution; they had averaged

once a year during the preceding decade. As Boston was the capital of the colony and the center of its political life, it is probable that the interest taken there in the debate of proposed measures and in the instruction of the legislators was greater than in any of the other towns. In Worcester, from the beginning of the town's life down to 1782, instructions had been voted eleven times, the earliest having been in the year 1765, and consisting simply of the following:

That it be an Instruction to Capt Ephraim Doolittle our Representative that he Joyns In no Measures Countenancing y^e^ Stamp Act.

In the following year, instructions were given upon nine points, the last of them being:

That you Give Deligent attendance at Every Session of y^e^ General Court of this Province this Present year and adhear to these our Instructions (and y^e^ Spirit of them) as you Regard our Friendship & would avoid our Just Resentment

Later Worcester instructions were cast in less menacing language. For the most part those of the period dealt with the troubles with Great Britain, but protests against the burdens of taxation were frequent. Thus in 1767 the representative was instructed to use his

Indeavour to Relieve the People of this Province from the Great Burden of Supporting so many Latin Grammer Schools whereby they are Prevented from attaining such a Degree of English Learning as is necessary to Retain the freedom of any State

The representative of a decade later (1784) was instructed by the Worcester town-meeting to use his best endeavors to get the general court removed from Boston to some country town on the ground that the sea port towns by the general court being held in Boston

have great advantage of the Countrey Towns by takeing the advantage of a thin house to call in all their members to carry any motion that best Serves their intrest.

Instructions for representatives were usually prepared by a committee appointed for that especial purpose, who reported their draft to the town-meeting, where each article was discussed, modified if need be, adopted or rejected. They covered a wide range of interests: education, morality, manufactures, commerce, the fisheries, taxation, relations with Great Britain, etc., and varied in length from a line or two to half a dozen pages. They often expressed the utmost confidence in the representatives chosen; and men of eminence and

capacity accepted election, although they knew that they would be subject to such instruction. An excellent illustration of the tone of these instructions is afforded by the resolutions of the Boston town-meeting of 1764:

"By this choice, they, (the freeholders of this town,) have delegated to you the power of acting in their Public Concerns, in general, as your prudence shall direct you; always reserving to themselves the Constitutional right of expressing their Minds, and giving you such Instruction upon particular Matters, as they at any Time shall Judge proper. Although the preamble stated that the election "affords you the strongest Testimony of that Confidence which they place in your Integrity and Capacity" there follow two pages of specific instructions.

Nor did the custom of instructing representatives lapse with the adoption of the constitution, in which, as we have seen, its exercise was asserted as a right. In 1783, upon the committee to prepare the Boston town-meeting's instructions to representatives was Sam Adams, himself, who had so recently served as a member of the special committee to draft the bill of rights. It is safe to assume, therefore, that the instructions prepared by this Boston committee in form and spirit were in precise accord with the intent of the framers of the Constitution. They certainly are sufficiently explicit; beginning with commendation and expressions of confidence, they proceeded to remove any doubt as to the final source of authority:

We confide in your Integrity and good Understanding to conduct the Public Affairs in our Behalf in such Manner as to promote the Interest and Safety of the Commonwealth at Large and of this Metropolis in particular. It is nevertheless our unalienable Right to communicate to you our Sentiments; and when we shall judge it necessary or convenient to give you Instructions on any Special Matter, and We expect you will hold yourselves at all times bound to Attend to and to Observe them.

After the days of the Revolution and its attendant disturbances were past, the practice of instructing delegates seems to have fallen into general disuse. In later years, instances of its exercise became practically unknown, and it occasioned not a little surprise when, in the middle of the century it was unearthed and made use of to put an end to an obstinate deadlock in the legislature over the election of a United States senator. The Massachusetts legislature which met in 1851 was controlled by a coalition of democrats and free soilers. Charles Sumner was the free soil candidate for the senatorship, but

when the time of the election came, the democrats in considerable numbers bolted his nomination, and the election was thus held up for more than three months. The struggle dragged on until town-meetings were called in several towns, and the representatives were there instructed to vote for Sumner, a mandate which not a few of them were glad to obey. This enabled enough men to change their voting, so that he was speedily elected.

From a reading of article xix of the bill of rights and from a study of the early instructions, there can be no doubt that it was the intent of the framers of our Massachusetts Constitution to assert the right of instruction; that such instructions were frequently given, and with the expectation that they would be considered binding; and that this act of instructing was not thought inconsistent with the system of representative government, nor derogatory to the dignity and independence of a representative in such a degree as to prevent men of eminence and capacity from accepting an election to the general court.

One distinction of importance, however, is to be emphasized between the unvarying exercise of this right of instruction in the past and the method which these public opinion bills present for the future. The historic giving of instructions was—so far as I can discover any evidence—invariably by the individual town, in town-meeting assembled, to the representatives of its own choice, and to no others. To this town-meeting it was not only the privilege but the duty of every voter to come. There the several articles of the instructions were subjected to discussion, one by one, and each voter present might question, approve, or protest. In practically every instance, all this took place in the very presence of the men to whom the instructions were being given. It was, therefore, possible for them to take a citizen's part in the discussion; they could not fail to get at the precise spirit and meaning of the instructions as there adopted by the majority, and if these did not accord with the representatives' opinions, it was possible for them, then and there, to decline to serve, rather than accept office under an obligation to act contrary to their best judgment. In sharp contrast with this, the historic mode of instruction, the so-called "advisory initiative," as provided for in our last public opinion bill, would put pressure to bear upon the representative by a majority not of his own townsmen by whom he had been elected, but by a majority of the number of voters from all over the State—and that number might be but a small minority of the

electorate—who were interested enough to vote upon this particular question. There is here no assurance—as in the instruction by town-meeting—that the voter has had both sides presented to him. Moreover, an interesting question of divided allegiance might often present itself. If the voters of Brookfield, in town-meeting assembled, instruct their representative-elect, John Brown, to support a certain measure, and if, on that same day, the State election results in the passage of a public opinion vote virtually instructing, or advising, all representatives to oppose that very measure, what ought John Brown to do? This dilemma is by no means a visionary one. Unless it be conceded that instruction by town-meeting is entirely a thing of the past, it is not at all improbable that in many cases the public opinion vote would come in sharp contradiction with instructions already given by the town.

The advocates of the Massachusetts public opinion bills, in my opinion, have made good their contention that it was the intent of the framers of the Constitution to assert for the voters a right to give to their representatives mandatory instructions. They have shown that the growth of cities has made the exercise of this right by the town-meeting method in the city constituencies entirely impracticable. On the other hand, I believe that they are wrong in their insistence that instruction of representatives by majority vote of the massed voters of the commonwealth would accord with the intent of the framers of the Constitution. To the men of 1780 the town was neither a mere blotch on the map, nor a convenient election precinct; it was a political entity, in many cases older than the State to which its delegates were at that moment giving a fundamental law; and it was entitled to speak with its own voice, without having that voice drowned by the clamor of other towns, still less by that of an aggregation of voters from the State at large.

The opponents of the measure laid stress upon the inadequacy of the precedent urged by its advocates, and insisted that the adoption of the public opinion vote would be a distinct innovation and a radical departure from the principles of representative government. They advanced the arguments usually put forward in opposition to any form of direct legislation. They insisted that the mode of securing this popular vote upon a "question of public policy" gave little warrant for the assumption that it would represent the real *opinion*, the reasoned conviction of the people of the commonwealth. They also attacked what they deemed extravagances of the bill, such as the

small number—less than 1 per cent of the qualified voters—into whose power it gave the opportunity to force propositions before the people; and they criticised the laxness of the precautions to ensure the genuineness of signatures to the petitions and applications.

The failure of the bill before the legislature was due in part to the lack of agreement among its advocates as to its real intent and probable effects. It is to be assumed that most of its supporters were propagandists of direct legislation. Yet some of its leading advocates declared themselves not in favor of the initiative and referendum, and grounded their action in supporting this bill upon the claim that this was a preventive measure, which would make unnecessary recourse to more radical devices, the popular vote being merely an expression of opinion. To the writer, this position seems illogical if not disingenuous. The sole purpose in securing the popular vote can be only that it may put upon the legislature strong pressure in favor of the measure advocated. Propagandist journals in favor of direct legislation frankly call such an "advisory initiative" the "entering wedge" for direct legislation, and I do not see how anyone can read the story of the past fifteen years of struggle without accepting that as the natural view to be put upon it. It is conceivable that an ill-advised measure might be passed by popular vote. If, then, the legislature, with its better opportunities—too often neglected—for thorough and candid investigation, should defeat it, the veriest tyro in politics must know that against the members so voting there would be urged with great bitterness, not primarily their attitude upon the real merits of the measure in question, but their "thwarting the will of the people." Thus the effect would be to urge on the direct legislation propaganda by an appeal to popular resentment, whenever the legislature failed to translate into law an "opinion" which may have secured a by no means warranted approval at the hands of a narrow majority in a small popular vote.

Not less significant than the bills themselves and the course which they have run in the legislature are the trend of the measures and the character of the support which they have enlisted. The measures, as has been indicated, have become distinctly more radical. Yet legislative proposals of a character which, a few years ago, found their chief advocates among radicals, labor leaders and socialists, have now been zealously supported by men of influence in quite other ranks, The leader in the last campaign, as president of the Massachusetts Public Opinion League, is a man who has done efficient work in

reform politics both in city and State, and who, a few years ago, polled a substantial vote as a candidate for the governorship. Among the most earnest speakers for the bill from the platform of Faneuil Hall were Edwin Doak Mead, reformer and publicist, and President Eliot of Harvard University. Such accessions to the ranks of its supporters have both evidenced and contributed to the substantial growth of this movement. Nevertheless, in the commonwealth at large the project seems as yet to have aroused no very intense interest. Until legislative abuses in Massachusetts become greater, or until its advocates agree in urging a public opinion bill which is more conservative and more carefully drawn than that of the past session, there is little prospect of its becoming law.